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IN THE

Supreme Court of the United States

October Term 1963

No. 528

NORFOLK DREDGING COMPANY,
a Virginia corporation,

Petitioner,

vs

SYLVESTER LAWRENCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SYLVESTER LAWRENCE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Norfolk Dredging Company, your Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on July 16, 1963.

OPINIONS BELOW

The memorandum opinion of the District Court denying Defendant's motion to dismiss is reported at 194 F. Supp. 484 (Appendix A). The opinion of the Court of Appeals is reported at 319 F. 2d 805. (Appendix B)

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1963. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether in a suit brought under the Jones Act, 46 U.S.C.A. 688, for personal injuries sustained on navigable waters of the United States, the Petitioner was entitled to have the jury rather than the court determine Respondent's status as "a member of the crew of a vessel" as the term is used in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et seq.

STATUTES INVOLVED

The statutes involved are 46 U.S.C.A. 688, commonly known as the Jones Act, and 33 U.S.C.A. 901, et. seq., commonly known as the Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT

Respondent, who is thirty-five years of age, was employed by Petitioner for a period of approximately ten years. On September 3, 1957, while supervising the movement of an anchor from an equipment barge to Derrick Barge #8, in the waters of Oregon Inlet near Manteo, North Carolina, Respondent suffered an injury to his right leg. He was hospitalized until May 5, 1958. On April 5, 1959 he returned to work for Petitioner in the same capacity he enjoyed before the injury.

Petitioner is a dredging company and customarily

moves earth from shoal waters to the shore. Its apparatus includes digging equipment and hydraulic lines through which the silt moves to the disposal area. While the dredge is in operation it is virtually stationary although it inches along the ground as its work progresses. The structure is made rigid by the use of spuds embedded in the soil or bottom. It has no motive power. The dredge serves as a base of operation for a gang of laborers who handle the pipelines which convey the silt. Respondent was one of these laborers. (R. Appellant's Appx. p. 38). He had no seaman's papers, no nautical training and no watch-standing duties as is customary aboard a seagoing vessel. (R. Appellant's Appx. pp. 36, 48, 39). He was paid by the hour and was free to leave the dredge when his work was completed. (R. Appellant's Appx. pp. 44, 39). On the frequent occasions when he slept and ate aboard the dredge he paid for his board and room. (R. Appellant's Appx. p. 38). In the course of his employment he worked in building up land areas for highways, levees and spillways. (R. Appellant's Appx. pp. 50, 51).

In January, 1960, Respondent filed a Complaint under the Jones Act (46 U.S.C.A. 688) alleging that he was injured while employed as a member of a crew of a vessel owned by Petitioner and demanding a jury trial. Petitioner filed a motion to dismiss on the grounds that Respondent's exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. C.A. 901, et. seq.). In a memorandum opinion reported at 194 F. Supp. 484, the trial court denied Petitioner's motion on the ground that the status of Respondent could not be determined as a matter of law. Petitioner then filed its answer denying that Respondent was a member of a crew of a vessel and a counterclaim seeking recovery or set-off of the sums paid to Respondent pursuant to the

Longshoremen's and Harbor Workers' Compensation Act.

On March 26, 1962, the case was tried before a jury. Petitioner, however, was denied a jury trial on its counterclaim. Neither was the jury allowed to consider the issue of Respondent's status as a "seaman-member of a crew", the Court instructing the jury that Respondent occupied such a status as a matter of law. The jury returned a verdict for the Respondent in the amount of $100,000.00. The District Court declined to set aside the jury's verdict, entering judgment for the Respondent on December 20, 1962. The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Fourth Circuit on July 16, 1963.

REASONS FOR GRANTING THE WRIT

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901, et. seq., provides compensation for injuries "occurring upon the navigable waters of the United States" and is by its terms an exclusive remedy. The Act, however, expressly excludes from its coverage "a master or member of a crew of any vessel," 33 U.S.C.A. 903(a)(1). Thus, in an action under the Jones Act, 46 U.S.C.A. 688, seeking damages for injuries sustained on navigable waters of the United States it is essential to the claimant's right to recover that he be "a master or member of a crew of a vessel." The decision as to a claimant's status as such has heretofore been deemed a decision of fact rather than of law and has been left to the discretion of the jury. In the instant case, however, the trial court instructed the jury that Respondent was, as a matter of law, a "member of a crew of a vessel." The Circuit Court affirmed.

In order to appreciate the nature of Respondent's employment it is necessary to understand the design and function of a hydraulic dredge and its attendant equipment.

A hydraulic dredge is essentially a barge laden with equipment. Although generally defined as a vessel, it differs from most vessels in that it is peculiarly adapted to the single function of removing earth by pipeline from one location to another. It does not transport goods and materials as do most vessels and does not provide its own motive power. Those who labor about a dredge may be divided into two categories: first, a group which works primarily aboard the dredge itself, such as the captain and engine room personnel, and secondly, a group which concerns itself primarily with the movement and maintenance of the long pipelines which convey the dredged material to a disposal area. The Respondent was one of the latter and his duties consisted almost entirely of tending pipeline both in shoal water and on land. Because of the peculiar nature of Respondent's duties, as well as other factors which will be enumerated later, Petitioner contends that Respondent's status is distinctly different from the usual concept of a "member of a crew of a vessel"; that the record contains evidence upon which the jury could have determined that Respondent was not a "member of a crew"; and that the trial court in ruling on the issue as a matter of law, and the Circuit Court in affirming, violated the mandate of this Court in *South Chicago Coal & Dock Co., et al, vs Bassett, Deputy Commissioner,* 309 U.S. 251, 258 S. Ct. 544, 84 L. Ed. 448, and in the decisions following its precedent. (See *Senko vs LaCrosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415, 1 L. Ed. 2d 404; *Grimes vs Raymond Concrete Pile Co.*, 356 U. S. 252, 78 S. Ct. 687, 2 L. Ed. 737).

The gist of the Bassett decision, supra, is contained in the following excerpt from the opinion delivered by Mr. Chief Justice Hughes:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not a 'member of a crew' turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner. Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial." (Page 257).
>
> * * * *
>
> "Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law. That is, that *upon the undisputed facts* the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon the vessel. We are unable to so conclude." (Page 258) (Emphasis added).
>
> * * * *
>
> "Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling." (Pages 260-261).
>
> "The judgment of the Court of Appeals is affirmed." (Page 261).

Further clarification of the court's position was provided by the *Senko* decision, supra, in which Mr. Justice Reed in delivering the opinion stated as follows:

> "In *South Chicago Co. vs Bassett*, 309 U. S. 251, we

said that whether or not an employee is 'a member of a crew turns on questions of fact' and that, if a finding on this question has evidence to support it, the finding is conclusive. * * * *" (Pages 371-372).

* * * * *

"* * * We believe, however, that our decision in *South Chicago Co. vs Bassett,* supra, has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, * * * *" (Page 372).

* * * * *

These two decisions (Bassett and Senko) define, in terms as clear as such definitions permit, the function of the jury in determining the status of a Jones Act claimant. Nevertheless, it has been necessary for this Court on numerous occasions to reassert the basic doctrine that whether or not a claimant is a "member of a crew" is an issue to be determined by the trier of the facts. (*Gianfala vs Texas Co.,* 350 U. S. 879, 76 S. Ct. 141, 100 L. Ed. 775; *Butler vs Whiteman,* 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed 2d 754; *Braen vs Pfeifer Oil Trans. Co.,* 361 U. S. 129, 80 S. Ct. 247, 4 L. Ed. 2d 191; *Grimes vs Raymond Concrete Pile Co.,* supra.) The dilemma presented by the issue has even extended into the state courts. *Brannan vs Great Lakes D. & D. Co.,* 253 Minn. 28, 91 N. W. (2d) 166, 1963 A. M. C. 1053.

The seeming reluctance of the lower courts to adhere to this basic doctrine results in the writer's opinion, from a two-fold cause: first, the courts have tended to overdefine, in legal terms, the simple phrase "member

of a crew of a vessel;" secondly, the Circuit Courts (certainly the Fourth Circuit in this instance) have placed a distorted interpretation upon this Court's decision in *Norton vs Warner Co.*, 321 U. S. 565, 88 L. Ed. 931, where it was held that on the peculiar facts of the case reasonable men could not differ as to the claimant's status as a "member of a crew." As a consequence there has been a gradual errosion, almost imperceptible in the individual decision, of the area in which Congress intended the jury to function. The decisions of the Circuit Courts have built one upon the other in the manner of an inverted pyramid until, as here, the basic law connot support the ensuing results.

The error is manifest in the following excerpt from the opinion of the Circuit Court in the instant case:

> "We feel that our disposition of the question in the instant case is controlled by the Supreme Court decision in *Norton vs Warner Co.*, 321 U. S. 565 (1944), wherein the Court held that as a matter of law the injured employee was a member of the crew. The only apparent difference between *Norton* and this case before us is that in the former the injured employee received his compensation on a monthly rather than on an hourly basis and performed somewhat less varied duties. There, as here, the vessel was a barge, had no motive power, the employee bought his own meals, had little experience as a seaman and had only incidental navigational duties such as handling lines, responding to the whistles of tugs and posting navigational lights and signals, while his main duties consisted of taking general care of the vessel.
>
> * * * *
>
> "The dredging company attempts to distinguish the *Norton* case from the instant case, on the theory that the claimant in Norton was aboard exclusively for navigational purposes; but we are told by the court

in that decision that navigational, in the broad sense in which it is used in these cases, is not confined strictly to the actual navigating or movement of the vessel but 'embraces duties essential for other purposes of the vessel,' and that a person who at all times contributes to the labors about the operation and welfare of the vessel when she is upon a voyage is engaged in 'navigation' and must be considered a member of the crew." (Appendix B, pp. 6, 7).

The Circuit Court has sifted the facts to fit the legal mold. The vessel here was not a barge but a dredge (admittedly a slight distinction). More significantly, the Respondent's duties did *not* include "taking general care of the vessel." His duties were not only "more varied" but were to an extreme degree more dissociated from the welfare of the vessel. The Respondent was not required to be continuously aboard as was the claimant in the Norton case, who was in fact the only person assigned to the barge and alone responsible for its seaworthiness.

In ignoring these manifold distinctions the Circuit Court has further constricted the area in which the jury may exercise its discretion. It has seized upon those facts which in the Norton case were deemed significant in finding the claimant to be a "member of a crew" but has ignored those facts of a more pragmatic but less legalistic significance. That the Respondent was not required by the terms of his employment to stand by the vessel until the completion of its so-called voyage, that he was not exposed to the perils of the open sea, that he was not required to remain aboard to stand watches and thereby incur additional hazards and discomforts; these factors which distinguish the Respondent from the traditional concept of a seaman have been ignored while resort has been had to fictional definitions of the term "navigational

duties." Thus, by this gradual process of redefinition the issue has been transformed into a matter of law, not because Congress intended it thus, but because the Courts in an eagerness to find and furnish guidelines have replaced the words "member of a crew" with more complex phraseology requiring legal rather than practical analysis.

What, then, is the area in which Congress intended for the fact-finder to exercise its discretion?

There are on the one hand those seamen who are unquestionably members of the crew of a vessel. They are signed on in various capacities for the duration of the voyage and their duties are unquestionably connected with the navigational function of the vessel; they in some manner facilitate its movement (whether cooks or engineers) from one point to another. There are on the other hand those persons whose work, though connected with vessels and shipping, is primarily dockside and who contribute to the welfare of the vessel only in the sense that they are necessary to the fulfillment of the vessel's purpose; these are such workers as stevedores, or refitters. The former group was undoubtedly intended by Congress to be excluded from the Longshoremen's Act, whereas the latter were unquestionably intended to be included. Between these two clearly defined groups, however, is a third group composed of maritime workers whose duties are such that they cannot be defined either as members of a crew or as longshoremen. This group is to a large extent composed of dredgemen and bargemen who labor in inland waters and whose duties cannot be clearly defined as navigational. It is within this third group that the fact-finding body must exercise its discretion.

The nature of the jury's discretion and the broad

lines in which it may be exercised are well described in *Offshore Company vs Robison*, 266 F. 2d 769 (5 Cir., 1959), at pages 779, 780:

> "Attempts to fix unvarying meanings have a firm legal significance to such terms as 'seamen,' 'vessel,' 'members of a crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts. The Jones Act cases involving coverage are similar in this respect to many negligence and contributory negligence cases.
>
> "Under the Jones Act, judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that the claimant was a seaman, a member of a crew of a vessel. * * *"

The evolution, via judicial decision, of the concept of what constitutes a "member of a crew" and the extent of the resulting conflict in the cases are evidenced from a comparison of the instant case with the much earlier decision in *Diomede et al vs Lowe, Deputy Com'r, et al*, 87 F 2d 296 (2nd Cir., 1937), cert. den., 301 U. S. 682, 81 L. Ed. 1340, 57 S. Ct. 783.

Here, the facts relevant to Respondent's status as a member of a crew are as follows:

1. He was paid by the hour. (R., Appellant's Appx., p. 44).

2. After working hours he could go and come as he pleased. (R., Appellant's Appx., p. 39).

3. He did not go to seamen's school. (R., Appellant's Appx., p. 48).

4. He did not have seamen's papers. (R., Appellant's Appx., pp 36, 49).

5. His primary duty was to handle pipeline and to see that it was in proper condition. (R., Appellant's Appx., p. 49).

6. After his accident he returned to his same job, (R., Appellant's Appx., pp. 50, 56), which he later described as building up land areas for highways and construction on land, maintaining levees, spillways and pontoon lines. (R. Appellant's Appx., p. 51).

7. He frequently ate and slept aboard the dredge but on such occasions paid room and board. (R., Appellant's Appx., pp. 38, 43).

8. His work was essentially that of a laborer and foreman over laborers. (R., Appellant's Appx., pp 38, 49).

9. The primary duty of the laborers was the handling of pipeline which included pipeline on the shore as well as the pontoon lines. (R., Appellant's Appx. p. 38).

10. He sometimes handled lines in tying up barges or tender boats and put out kerosene lights on floating auxiliary structures. (R., Appellant's Appx. pp. 31, 32).

Despite the existence of these undisputed facts, the issue was taken from the jury and respondent was found to be a member of a crew as a matter of law.

In *Diomede vs Lowe*, supra, the decedent, Nicholas

Diomede had been in charge of a dump scow. He was required to remain aboard at all times except when special permission was granted and was paid $1.00 per day with extra compensation of $3.00 per day when the scow was loading or on a voyage. His duties as determined by the Deputy Commissioner were as follows:

> "* * * to supervise the loading of the scow so that the cargo would be evenly distributed and the scow ride on even keel; to be watchful lest the scow become unseaworthy; to make minor repairs to prevent the same; to pump out water which leaked into the barge; to unfasten the lines from the dock to the scow when voyages were begun; to lengthen and shorten the lines between the tow and the scow when necessary enroute; to tie up the scow to the dock upon return from a voyage; to open and close the hatches of the scow; to dump the cargo upon arrival at the dumping grounds; to splice the lines when necessary, and to keep running lights in order and visible." (Page 297).

In a proceeding by Angelia Diomede, the decedent's widow, to recover compensation under the Longshoremen's Act, supra, the Deputy Commissioner rejected the claim on the grounds that decedent was a "member of a crew." In a suit to set aside the Deputy Commissioner's order the District Court found for the plaintiff, holding that the decedent was not a member of a crew. The United States Court of Appeals for the Second Circuit affirmed. This Court denied certiorari.

It is apparent that in his permanency of attachment to a vessel and in his performance of duties of a traditionally navigational nature, Diomede was more distinctly a member of a crew than was Respondent.

The conflict between this case and the Diomede case

is only one of many which have resulted from the incursion of the judiciary upon the domain rightfully that of the jury. In order to resolve these conflicts by clear reassertion of the jury's function in these cases, Petitioner urges that this Court grant certiorari. The issue involves more than a mere weighing of the evidence; it involves a basic interpretation of the jury's function in a critical area of maritime law.

The first thing demanded by Respondent's complaint was trial by jury. Petitioner too wished a trial by jury and designed its case upon the presumption that its right to such a trial would not be denied. The value of this right is inestimable: it is basic, deeply rooted in our legal tradition. As Mr. Justice Sutherland wrote, speaking for the court in *Dimick vs Schiedt*, 293 U. S. 474, 485:

> "The right of trial by jury is of ancient origin, characterized by Blackstone as 'the flory of the English law' and 'the most transcendent privilege which any subject can enjoy' (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, sec. 1779), ' * * * the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms.' With, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

The right to a jury trial has frequently been reasserted with specific reference to cases under the Jones Act. in

24 NACCA Law Journal at page 208, *Offshore Co. vs Robison*, supra, is commented upon as follows:

> "Two of Judge Wisdom's cardinal conclusions in the instant case are surely unassailable: Congress has seen fit to allow juries to decide who are 'seamen' under the Jones Act, and the Supreme Court has underwritten and revitalized the role of the jury's prerogative in crew-member-determination cases. This in turn has resulted in the salutory extension of the benevolent provisions of the Jones Act to non-traditional or borderline seamen and unconventional vessels."

And further at page 209:

> "If there ever was any doubt as to the primacy of the jury's role in resolving the issue of seaman-status in Jones Act suits, that doubt has been laid to rest, for those who read understandingly, by the Supreme Court's repeated rulings in the Grimes-Butler series of cases." Referring to *Butler vs Whiteman*, 356 U. S. 271, and *Grimes vs Raymond Concrete Pile Co.*, 245 F. 2d 437, (1 Cir., 1957) reversed 356 U. S. 252 (1958).

Again the right to trial by jury in a Jones Act case was the issue in *Jacob vs New York City*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed., 1166, where Mr. Justice Murphy in delivering the opinion stated:

> "The right of jury trial in civil cases at common law is a basic fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded

by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrech he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it." (Pages 752, 753).

* * *

" * * * Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of the case to the jury." (Page 756).

Petitioner has cited the foregoing authorities in detail (hoping not to belabor a point with which the Court is undoubtedly in agreement) because it feels that therein rests the urgency of this Petition. The denial of trial by jury is a theme which has been played upon time and again and doubtless the Court tires of its repetition. But the danger that this right may be denied lies not in the obvious and gross violations but in those which come about, as here, by a gradual and seemingly legitimate wresting by the judiciary. Petitioner urges that its right to a jury trial as well as that of the Respondent and the many others similarly situated be protected by a full restoration of the jury to its rightful function in a suit under the Jones Act.

CONCLUSION

The ruling below conflicts with the decisions of this Court and deprives the Petitioner of a trial by jury. Accordingly, the writ should be granted.

Respectfully submitted,

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